
In the Matter of the Fee Dispute
Arbitration between:

SAI TRUST and ROBERT MEMBREÑO,
Individually and As Trustee For
SAI TRUST,

Clients,

Case No. 247

-and-

CARUSO GLYNN, LLC,

Respondents.

11 Plandome Road
Manhasset, New York
October 22, 2012

BEFORE: VINCENT NICOLOSI, Chairman
SUSAN CHEMTOB, Arbitrator
DAVID ROSEN, Arbitrator

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A P P E A R A N C E S :

HILL RIVKINS LLP

Attorneys for Claimants

45 Broadway, Suite 1500

New York, New York 10006-3793

BY: JOHN J. SULLIVAN, ESQ.

LAWRENCE C. GLYNN, ESQ.

Attorney for Respondents

36 Peck Slip

New York, New York 10038

ALSO PRESENT:

MARC G. MEMBREÑO

ROBERT MEMBREÑO

* * *

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2 Whereupon,

3 R O B E R T M E M B R E Ñ O ,

4 having been first duly sworn/affirmed,

5 was examined and testified as follows:

6 Whereupon,

7 J O H N J . S U L L I V A N ,

8 having been first duly sworn/affirmed,

9 was examined and testified as follows:

10 Whereupon,

11 L A W R E N C E C . G L Y N N ,

12 having been first duly sworn/affirmed,

13 was examined and testified as follows:

14 MR. NICOLOSI: Good morning,

15 everybody. My name is Vincent

16 Nicolosi. To my right is Susan

17 Chemtob. To my left is David Rosen.

18 We will be the three arbitrators that

19 are going to hear the fee dispute.

20 It has been our policy before we

21 commence to ask a very general

22 question. Have both the client and

23 the attorney attempted to amicably

24 resolve the issue of what the fee is?

25 At the outset I want to just

1 Proceedings

2 tell you, we are not here to judge the
3 quality of Mr. Glynn's work, whether
4 you agree or disagree with whether he
5 was successful or not. Our primary
6 and only purpose is to discuss and
7 determine the validity of the claim
8 for legal fees. Nothing else.

9 So, I know in the package we
10 received, or I received anyway, a copy
11 of the decision from the Southern
12 District. All well and good. But we
13 are not judging your entitlement to
14 the fee based upon your success in the
15 action. Okay? It's whether you guys
16 had a meeting of the minds as to what
17 the fee was and whether or not you, in
18 fact, did the work you said you did.

19 Does everybody understand that?

20 MR. SULLIVAN: Understood.

21 MR. GLYNN: Understood.

22 MR. NICOLOSI: Now, I have made
23 it my policy over the last 15 years of
24 doing this to ask if you would like us
25 to step out and for you people to

1 Proceedings

2 decide whether you can resolve it
3 without our intervention. It's
4 entirely up to you.

5 MR. SULLIVAN: We're prepared to
6 go forward, Mr. Chairman.

7 MR. GLYNN: Agreed.

8 MR. NICOLOSI: I, in reading the
9 papers, I have a question as to what
10 the amount is. There was an amount of
11 11,000 and change and there was also
12 an amount of 16,000 and change. I
13 never saw anything from the client
14 either accepting or denying which
15 figure is the accurate figure that we
16 are going on.

17 You submitted two numbers.

18 MR. GLYNN: Correct,
19 Mr. Chairman.

20 MR. SULLIVAN: From our
21 perspective, Mr. Chairman, neither
22 number is accurate. In fact, the
23 position we are taking today and
24 submit the evidence will support was
25 that not only was counsel paid

1 Proceedings

2 everything he was entitled, but in
3 fact he collected more than he
4 properly should have billed for.

5 MR. NICOLOSI: That brings me
6 then -- and the procedure is going to
7 be the client will make a statement,
8 you can ask the client a question and
9 then arbitrators can chime in and ask
10 questions as well.

11 In the package that I received,
12 I did not receive a retainer agreement
13 of any kind.

14 Did you get any?

15 MR. ROSEN: No.

16 MR. NICOLOSI: I don't have any.
17 Other than an e-mail that you
18 forwarded to the client back on
19 October 8th of '09, I believe it was,
20 where you were suggesting a
21 contingency fee basis --

22 MR. GLYNN: That's correct.

23 MR. NICOLOSI: They didn't
24 respond until December, some two
25 months after.

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2 MR. GLYNN: Correct.

3 MR. NICOLOSI: Putting that
4 aside, can you give to any of the
5 arbitrators a single retainer
6 agreement that was entered into
7 between you and the client?

8 MR. GLYNN: Other than what was
9 submitted, no.

10 MR. NICOLOSI: Other than what
11 was submitted. Do you have any?

12 MR. SULLIVAN: No, sir.

13 MR. GLYNN: There was none. I
14 can represent there was no written
15 formal retainer agreement. It was a
16 proposal in the e-mail you mentioned
17 and it was followed up by two invoices
18 for accounts stated. There is no
19 formal retainer agreement.

20 MR. NICOLOSI: Well, you also
21 gave us a list as Exhibit B, I
22 believe, was the summary -- or Exhibit
23 C, a summary of the invoices. It was
24 the last page in your document.

25 MR. GLYNN: Correct.

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2 MR. NICOLOSI: And you
3 acknowledge payments that were made.
4 Correct?

5 MR. GLYNN: Correct. I may
6 offer some background.

7 It was our understanding that
8 this was a contingency fee; that it
9 was proposed and it was never objected
10 to and that by following up with two
11 invoices we established an account
12 stated and their time to object to it
13 had long passed. So we were operating
14 on the belief that it was a
15 contingency fee arrangement.

16 As an accord to the client, we
17 agreed to accept, under certain
18 conditions, to go forward on a time
19 basis. Those conditions were never
20 met and still have not been met.

21 So, they wanted to modify what
22 we believe to have been a meeting of
23 minds as to the contingency fee under
24 certain conditions, specifically that
25 all invoices would be paid within

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2 30 days; they agreed to the higher
3 hourly rate than what they had been
4 paying when --

5 MR. NICOLOSI: You are basing
6 this on an implied acknowledgement on
7 their part. There is nothing in
8 writing?

9 MR. GLYNN: Other than the
10 e-mail that was proposed.

11 MR. NICOLOSI: Right.

12 MR. GLYNN: And the lack of any
13 objection thereto or timely objection.

14 MR. NICOLOSI: One last question
15 and then I will ask the client to make
16 a statement. But the invoices that
17 you have submitted as exhibits that I
18 believe run from September of '09, you
19 have some from prior years but were
20 those from September of '09 going
21 forward, which is within the
22 contingency fee period that you just
23 described, assuming there was such a
24 period, were those invoices prepared
25 as they had been prepared previously

1 Proceedings

2 when you were on an hourly basis?

3 MR. GLYNN: No. The invoices
4 for the months of October and
5 November -- October invoice was sent
6 on November 2nd. I can submit that.
7 And the November invoice was sent on
8 December 2nd. Both of those indicate
9 no charge. They do show the time that
10 was worked but no charge, there is no
11 fee.

12 MR. NICOLOSI: My question is,
13 the time that is shown on those
14 invoices -- because you do, in fact,
15 come up with an amount that would be
16 based on a non-contingency basis.

17 MR. GLYNN: Correct.

18 MR. NICOLOSI: Are those fees
19 based upon prior billings when you
20 were not on a contingency basis?

21 MR. GLYNN: No.

22 MR. NICOLOSI: They are on an
23 increased basis, an increased hourly
24 rate?

25 MR. GLYNN: Correct.

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2 MR. NICOLOSI: Do you guys have
3 anything you want to ask?

4 MR. ROSEN: No. Fine.

5 MR. NICOLOSI: Go ahead.

6 MR. SULLIVAN: Thank you,
7 Mr. Chairman.

8 Unfortunately, it is a rather
9 tortured path that brings us here
10 today. It began with the underlying
11 litigation, progressed through a Civil
12 Court Complaint in Queens County,
13 which was supposed to have been
14 dismissed by stipulation referring the
15 matter to this arbitration panel.

16 But then the next thing that
17 counsel did was file suit against
18 Calpine, who was SAI's adversary in
19 the bankruptcy proceeding, on the
20 basis somehow that counsel was a
21 third-party beneficiary of the
22 underlying settlement agreement
23 between SAI and Calpine, trying to
24 collect a contingency fee from
25 Calpine.

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2 MR. NICOLOSI: 250,000-plus.

3 MR. SULLIVAN: The amount was
4 something in the middle two's, yes,
5 Mr. Chairman.

6 That matter was voluntarily
7 dismissed and refiled directly against
8 SAI Trust in the Southern District of
9 New York in the summer of 2011. In
10 opposition to that filing we moved to
11 dismiss as well as alternatively to
12 stay the matter pending arbitration in
13 accordance with the original
14 stipulation from the Civil Court in
15 April 2011, which finally brings us
16 here today.

17 SAI never agreed to a
18 contingency fee. The first thing we
19 will ask the panel to determine is to
20 make a declaration that there never
21 was a contingency fee agreed upon.
22 New York law is very clear that there
23 has to be an express agreement. A
24 contingency fee can never be implied.
25 Court of Appeals said so, 1972 DeGraff

1 Proceedings

2 v. McKesson & Robbins, 31 N.Y.2d 862.

3 There was no express agreement
4 for a contingency fees. Counsel
5 proposed it on October 8th, when he
6 first formed his own firm, followed by
7 a few weeks later questioning from the
8 client as to "What does contingency
9 fee mean?"

10 The two principals -- I should
11 have introduced them first beside
12 me -- Robert Membreno, at the end of
13 table, sole trustee of SAI Trust, a
14 trust organized under California law;
15 his son, Marc Membreno, oversees some
16 of the day-to-day operations.

17 Mr. Marc Membreno is vice
18 president of SAI Geothermal, Inc.,
19 which is a corporation operating out
20 of California, and the offices for SAI
21 Trust are with the offices for SAI
22 Geothermal, so Mr. Marc Membreno
23 provides administrative services over
24 the trust in his father's absence.

25 Mr. Robert Membreno resides in

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2 Nicaragua and has for the last several
3 years.

4 Between the time lag with Robert
5 Membreño being in Nicaragua and Marc
6 being in California, the questions
7 were posed to counsel as to what a
8 contingency fee meant. There was
9 discussions on this end and, again,
10 never an express agreement or remotely
11 an express agreement.

12 Counsel, in November, on or
13 about November 3rd, e-mailed his first
14 invoice or second invoice, I should
15 say, saying, "Fee waived. Contingency
16 fee waived."

17 Mr. Marc Membreño asked what
18 that meant on about November the 23rd.
19 Again more e-mails back and forth
20 between client and attorney, and then
21 discussion on this end on December the
22 8th an explicit rejection of
23 contingency fee.

24 SAI had never operated under a
25 contingency fee on any litigation it

1 Proceedings

2 has been involved in. They are in the
3 power generation business. There is a
4 lot of litigation in the power
5 generation business, real estate
6 issues, environmental issues.
7 Litigation is quite common. They
8 never had a case handled other than on
9 an hourly basis.

10 There was some more back and
11 forth between December 8th and
12 December 12th. On December the 8th,
13 the client proposed -- not proposed.
14 Said, "We are only going to do an
15 hourly basis." After arguments from
16 counsel on December 11th, the client
17 proposed going forward solely on an
18 hourly basis, however in the event
19 that counsel was able to settle the
20 case promptly, they would offer a
21 \$10,000 performance bonus.

22 Counsel made a counter-offer of
23 \$25,000 performance bonus plus any
24 portion of a recovery beyond \$850,000,
25 counsel proposed that be solely for

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2 his account. In other words, an
3 additional bonus, if you will, above
4 the \$25,000.

5 That was not agreed to on this
6 end. Nevertheless, they began
7 resubmitting bills and keeping time on
8 an hourly basis. At the end of the
9 day, on an hourly basis, counsel
10 billed in the neighborhood of \$35,000
11 in time bills, a little over 35,688.

12 MR. NICOLOSI: What period?

13 MR. SULLIVAN: Here is the
14 problem. Beginning September 1, 2009
15 through February 5, 2010. The problem
16 with the bills beginning
17 September 1st, counsel wasn't counsel
18 of record on September 1st, had no
19 right to bill client for anything.

20 Client was still represented by
21 its prior counsel, counsel's former
22 employer, Nicoletti Hornig & Sweeney.
23 Counsel resigned from Nicoletti Hornig
24 & Sweeney on or about October 7th and
25 October 8th formed his own firm and

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2 that was the first contact that the
3 client had that Mr. Glynn was going
4 out and forming his own firm and
5 taking the case with him.

6 Before that they had no
7 knowledge he was leaving Nicoletti's
8 office. To their understanding,
9 Nicoletti was the only firm
10 representing them in the New York
11 bankruptcy case.

12 MR. NICOLOSI: Was there a
13 retainer agreement with the old firm?

14 MR. SULLIVAN: There was.

15 MR. NICOLOSI: Signed?

16 MR. SULLIVAN: Signed agreement.
17 With the rates and expected work to be
18 performed.

19 Then, so you have an amount of
20 billings -- in that 35,688 are fees
21 that were improperly billed from
22 September 1, 2009 through October 7th.
23 Actually October 5th is the last day
24 referenced in the bills.

25 MR. ROSEN: Excuse me. Was

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2 there ever a formal substitution of
3 counsel in the action? When did
4 Nicoletti stop being attorney of
5 record and when did this attorney
6 start being attorney of record?

7 MR. GLYNN: October 2009.

8 MR. ROSEN: A formal
9 substitution?

10 MR. GLYNN: Yes.

11 MR. SULLIVAN: The status of the
12 litigation at that time, it was in the
13 process of being appealed to Second
14 Circuit or remanded to Bankruptcy
15 Court to the extent to which Calpine
16 either realized or did not realize the
17 Appellate District had jurisdiction
18 over what otherwise would have been an
19 interlocutory order.

20 It is our position that no fees,
21 hourly fees or otherwise, could have
22 been billed by Caruso Glynn, LLC prior
23 to October the 8th. The Nicoletti
24 firm did, in fact, submit a final bill
25 to SAI Trust in January of 2010,

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2 through October. It basically covered
3 September into the early part of
4 October when Mr. Glynn left the
5 Nicoletti firm.

6 MR. NICOLOSI: And was that the
7 6,000 amount that was referenced in
8 Mr. Glynn's e-mail that they would pay
9 the outstanding balance to Nicoletti?

10 MR. SULLIVAN: Correct. It
11 wasn't quite that much. Two reasons.
12 Nicoletti's firm was billing Mr. Glynn
13 out at 260 an hour, whereas when
14 Mr. Glynn when he went on his own
15 raised the rate to 320 an hour. So
16 there was a spread between the
17 different hourly rates.

18 There were a few time entries
19 that appeared in Mr. Glynn's bill that
20 did not appear in the Nicoletti bill.

21 MR. NICOLOSI: Was that bill
22 paid to Nicoletti?

23 MR. SULLIVAN: That bill was
24 paid to Nicoletti, yes.

25 MR. NICOLOSI: When?

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2 MR. SULLIVAN: It was paid early
3 part of 2010, I believe in April.

4 MR. NICOLOSI: And how much?

5 MR. SULLIVAN: The full amount
6 of the bill, which was \$5,148.

7 And in response to that bill
8 having been submitted by Nicoletti,
9 counsel objected to it, said Nicoletti
10 had no right to bill it even though
11 they were counsel of record and the
12 only counsel of record for that
13 period, and then said, "Fine. Pay that
14 and deduct the amount from the balance
15 you owe me."

16 But that didn't account for the
17 different hourly rate or the
18 additional time that appeared in the
19 Caruso Glynn bill that didn't appear
20 in the Nicoletti bill, as well as at
21 least two time entries for the first
22 week of October, one on October 2nd
23 and one on October the 5th.

24 In total you have the amount of
25 6,752 that Caruso Glynn billed for the

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2 month of September, all of which we
3 submit is unrecoverable because it
4 should have properly been billed by
5 the Nicoletti firm and was.

6 Then for the entries for
7 October 2nd and October 5th we have an
8 additional \$1,312 on October 2nd and
9 \$864 on October 5th.

10 MR. NICOLOSI: How much?

11 MR. SULLIVAN: 864 on
12 October 5th.

13 MR. NICOLOSI: And on
14 October 2nd was what?

15 MR. SULLIVAN: 1,312.

16 MR. NICOLOSI: That was billed
17 by whom?

18 MR. SULLIVAN: Those were the
19 amounts that were billed by Caruso
20 Glynn to SAI. And again we submit
21 every one of those hours was
22 improperly billed because only the
23 Nicoletti firm could bill for that
24 time and did bill for that time.

25 There was additional time spent

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2 that we object to in December, between
3 December 8th and December 12th, when
4 there was the discussion over is there
5 a contingency fee or is there not a
6 contingency fee?

7 All of the time that counsel
8 spent appeared in his bill even though
9 it had nothing to do with the Calpine
10 litigation. It was solely
11 discussions, e-mail discussions back
12 and forth among counsel and client
13 over what the proper terms of the fee
14 would be.

15 MR. NICOLOSI: But not legal
16 work for services rendered in
17 connection with any pending
18 litigation?

19 MR. SULLIVAN: Correct, sir. It
20 was only discussions back and forth
21 about would there be a contingency
22 fee, would there be a performance
23 bonus, what would the performance
24 bonus be?

25 We have time entries we have

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2 listed, three actually on December 8th
3 and three on December 11th of 2009.
4 The three entries for December 8th add
5 up to \$348 and then the three entries
6 for December 11th, you have \$128 for
7 one entry, 448 for another and 928 for
8 the third.

9 Two more items that we object to
10 on the time basis, the time billings:
11 On January the 6th there is a
12 six-tenths of an hour and all the
13 entry says is "File maintenance." It
14 is hard to figure out what, if any,
15 work was done on the matter.

16 And then finally when counsel
17 was ultimately directed to take no
18 further action on or about February
19 the 5th of 2010, there were another
20 two separate one-tenth of an hour
21 entries, \$32 each, counsel
22 acknowledging receiving that
23 instruction and acknowledging same.

24 So, we have added up all those
25 objectionable hours and we submit that

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2 number comes to \$11,136.

3 Then we turn to the so-called
4 performance bonus, which was proposed
5 by the client on or about December the
6 11th. It was \$10,000. The background
7 of that circumstance were Calpine
8 was -- had filed a notice of appeal
9 for the Second Circuit. Rather -- in
10 consideration, perhaps, of the time
11 and money and expense of an appeal,
12 the client proposed a \$10,000 bonus if
13 the case could be settled.

14 Counsel counter-offered with a
15 \$25,000 performance bonus request as
16 well as any fee above the 850 that
17 might be recovered. That
18 counter-offer operated, under Black
19 Letter contract law, to terminate or
20 reject the initial \$10,000 performance
21 bonus proposal. Nothing coming back
22 from client after that about the
23 \$10,000 bonus.

24 Now, unfortunately, even if
25 there was an agreement, counsel never

1 Proceedings

2 satisfied the prerequisite for it in
3 that he was unable to settle the case,
4 and the reason he was unable to settle
5 the case was because there was a
6 complete misunderstanding of the
7 nature of the offer that was being
8 made. Basically, you had counsel
9 talking about apples and Calpine
10 talking about oranges.

11 Counsel believed he was
12 negotiating for an all-cash bankruptcy
13 settlement. Calpine, on the other
14 hand, because it was a Chapter 11
15 debtor-in-possession, could only reach
16 a settlement with a creditor in
17 accordance with its reorganization
18 plan.

19 As it turned out, the
20 reorganization plan called for
21 issuance of stock to the unsecured
22 general creditor based on a specific
23 date. The stock was priced at a
24 specific date. It basically worked
25 backward.

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2 If we settle for X dollars on
3 the given settlement date, we then
4 figure out how many shares of stock
5 that number equals based on a price at
6 a given day. The problem was the
7 price wasn't current. The price the
8 bankruptcy plan required was a time in
9 the past, which called for valuation
10 on the date that it emerged from
11 bankruptcy.

12 Problem was, once it emerged
13 from bankruptcy, the stock price went
14 down. Even if you were to liquidate
15 all the shares, you basically would
16 only be getting about 70 percent of
17 the dollar amount of your unsecured
18 claim.

19 SAI was the one that figured
20 this out on its own. What they had to
21 do was have California counsel reach
22 out to Calpine to find out exactly
23 what the terms of the proposal were.
24 Only then did they find out, not from
25 counsel but from their own California

1 Proceedings

2 counsel, that the proposal, the offer
3 was a general unsecured claim.

4 Now, that was discussed between
5 them, that it was a general unsecured
6 claim, but it was never explained by
7 counsel to client that a general
8 unsecured claim with regard to Calpine
9 meant a share of stock -- shares of
10 stock rather than cash.

11 They found that out themselves,
12 figured out, did their own
13 calculations and then gave counsel a
14 specific settlement direction,
15 worded -- "This is the offer we want
16 you to make." Called for a mixture of
17 cash and stock depending on what date
18 the deductions and expenses were
19 calculated on.

20 Counsel came back, beginning
21 February 2010, and said, you know,
22 "They never responded to our last
23 demand of \$975,000," to which client
24 said, "When did you make a demand for
25 975 and how did you figure out 975

1 Proceedings

2 because the numbers before that
3 were --" Calpine had been offering in
4 the neighborhood of 740,000. SAI had
5 been demanding 825, 850.

6 Counsel for the first time
7 informed SAI that he had made a demand
8 for \$975,000.

9 When SAI asked, "When did you
10 make that and how did you calculate
11 it," the answer they received on
12 February 4, 2010. The demand had been
13 made back on December the 5th of '09
14 and the 975 number included a very
15 large contingency fee that counsel
16 expected Calpine to pay to him as
17 opposed to money going to SAI, the
18 beneficiaries of SAI Trust.

19 By that point in time, SAI had
20 no doubt that counsel was not
21 negotiating for his client's benefit
22 but more for his own benefit to
23 negotiate a larger fee for himself.
24 They gave him specific instructions to
25 take no further steps. At that point,

1 Proceedings

2 they had to fully instruct California
3 counsel to try and negotiate and
4 salvage a settlement agreement with
5 Calpine, which was done.

6 That was consummated in March.
7 I think it was eventually signed
8 around the end of March, early April
9 of 2010 and based on those -- the fact
10 that counsel was unable to consummate
11 the settlement with Calpine, any
12 performance bonus that might have been
13 agreed upon was not earned because the
14 settlement wasn't reached. The
15 performance that was contemplated
16 wasn't done.

17 So, what we have was billings
18 over a period of time that added up to
19 about \$35,000. 35,866, plus another
20 10 that appeared in his last invoice
21 for \$45,000.

22 SAI, to date, has paid the
23 amount of \$32,885.16. We have
24 calculated that of the 35,688 billed,
25 11,136 was not collectible and we

1 Proceedings

2 calculated a net overpayment of
3 \$8,184.16.

4 MR. GLYNN: 8,000, what was it?

5 MR. SULLIVAN: 8,184.16, the
6 very last page of our statement.

7 MR. NICOLOSI: Part of the
8 package that I received indicates
9 payments by SAI between October 26,
10 '09 and April 22, 2010 of 33,075.

11 MR. SULLIVAN: The records are a
12 little off between the two.

13 MR. NICOLOSI: Not a lot.

14 MR. SULLIVAN: Not a lot. The
15 amount that was paid -- could have
16 been wire transfer expenses that might
17 have been one way or the other.

18 MR. NICOLOSI: But from what I
19 am reading here, there was on
20 October 22nd of '10 a \$15,000 plus
21 payment made. Is that correct?

22 MR. SULLIVAN: Yes. 15,089.78
23 we have from our records.

24 MR. NICOLOSI: What invoices was
25 SAI paying at that point? For what

1 Proceedings

2 professional services that he rendered
3 were you paying for?

4 MR. SULLIVAN: They paid for the
5 time that was the sum that was still
6 outstanding on what SAI calculated was
7 owed between October and February.

8 MR. NICOLOSI: So they are
9 acknowledging, up until the point that
10 they said, "No further action are you
11 to take in connection -- you are
12 discharged as our attorney,"
13 basically.

14 MR. SULLIVAN: Essentially, yes.

15 MR. NICOLOSI: So up to that
16 point they acknowledged that there was
17 some 15,000 in legal fees that were
18 due to counsel?

19 MR. SULLIVAN: Through that
20 point in time, yes. Well, that he had
21 billed for. When they went back and
22 looked at it afterwards, they realized
23 there was a lot of items in there that
24 were objectionable. Had the matter
25 not gone forward, they were prepared

1 Proceedings

2 to drop hands. However, counsel
3 insisted on proceeding --

4 MR. NICOLOSI: But the invoices
5 were based not on a contingency basis.
6 An hourly rate?

7 MR. SULLIVAN: Correct.

8 MR. NICOLOSI: What was the
9 hourly rate that brought the
10 April 22nd invoice to 15,089.78?

11 MR. SULLIVAN: They didn't pay
12 each invoice as a single amount. They
13 would pay 2,000 here, 5,000 here.
14 That is the way they made payments to
15 Nicoletti and the way they kept making
16 payments to Caruso Glynn.

17 We have a collection of exhibits
18 that we're prepared to provide for the
19 panel with copies for everyone that
20 lists the breakdowns and the checks
21 that go with them.

22 The first payment, for example,
23 was for \$2,000. Second payment was
24 \$2,000. Third was \$2,000. The fourth
25 payment was 9,795. The next payment

1 Proceedings

2 was 2,000 and the final payment was
3 15,089.78.

4 MR. NICOLOSI: That is
5 consistent with what he has submitted
6 to the panel.

7 MR. SULLIVAN: So they weren't
8 paying -- the way they made their
9 payments, they would send a rough
10 amount. There would still be a
11 balance outstanding on an hourly bill.

12 And then, in April, final
13 payment was made based on what they
14 understood at the time they owed.
15 Turns out, as I said, in review later
16 they realized there were a number of
17 items in the bills that were
18 objectionable, primarily the time from
19 September the 1st through October the
20 5th.

21 MR. NICOLOSI: Again, going back
22 to the exhibit that counsel attached
23 to his response to your request for
24 arbitration, he listed a payment of
25 6,752 for September 1st of '09.

1 Proceedings

2 That's the amount that was due to
3 Nicoletti? Is that your position, and
4 that was paid to Nicoletti?

5 MR. SULLIVAN: There is a
6 difference because Nicoletti had a
7 lower rate for Mr. Glynn as well as
8 additional hours. But that bill
9 roughly --

10 MR. NICOLOSI: Corresponds to
11 the 5,000 --

12 MR. SULLIVAN: 5,148.

13 MR. NICOLOSI: 5,148. Right.
14 So, if you take off that amount, you
15 paid 33. If -- and I understand your
16 position. I haven't heard counsel
17 yet -- that that 67 comes off of his
18 49, you are down to like 32,000 it
19 appears. I am just looking at the
20 numbers. It appears that it is close
21 to being a wash.

22 But okay. Do you want to --

23 MR. GLYNN: Well, the important
24 aspect that Mr. Sullivan omitted was
25 the fact that SAI did receive a credit

1 Proceedings

2 for 5,000 and change for that billing
3 by the Nicoletti firm.

4 MR. NICOLOSI: But do you have
5 that on your chart? Did you recognize
6 that credit of 5,148 on your chart?

7 MR. GLYNN: Yes. It is included
8 in -- it was in one of the invoices --

9 MR. NICOLOSI: No, no. On the
10 chart that you prepared have you
11 reflected a credit of 5,148 against
12 that 49,000?

13 MR. GLYNN: Yes. That is how we
14 get to the 49,000. That number of 51
15 has been taken out of the amount owed.

16 MR. NICOLOSI: But the first
17 number on your chart is 6,000 and
18 change?

19 MR. GLYNN: Correct.

20 MR. NICOLOSI: And that
21 coincides with the number of 5,148?

22 MR. GLYNN: Right. But there
23 was a credit -- there was a credit
24 given in one of the invoices.

25 MR. NICOLOSI: But it is not

1 Proceedings

2 reflected on that chart?

3 MR. GLYNN: It is not. I don't
4 see where it is right now. I would
5 have to look through each individual
6 invoice to show it.

7 MR. NICOLOSI: Do you have any
8 questions that you want to direct to
9 the client?

10 MR. GLYNN: Well, absolutely.

11 MR. NICOLOSI: Again, please
12 avoid getting into the quality of your
13 work. We are restricting this to the
14 fee dispute only.

15 MR. GLYNN: I have exhibit
16 binders for the panel. If you would
17 turn to Exhibit A? This is directed
18 to Robert Membreno.

19 Whereupon,

20 R O B E R T M E M B R E N O ,
21 having been previously duly
22 sworn/affirmed, was examined and testified
23 as follows:

24 EXAMINATION BY

25 MR. GLYNN:

1 Proceedings

2 Q. Mr. Membreno, do you recognize
3 Exhibit A? A decision and order from
4 Southern District of New York?

5 A. Counsel, this is first time I
6 see this, quite frankly, or at least that
7 I recall seeing it. But let's assume that
8 it is a correct document from the Court.

9 Q. It is a decision and order from
10 settlement and release agreement the
11 Southern District of New York and is dated
12 June 9, 2009. I would turn your attention
13 to page 28 of the decision.

14 A. Yes, Counsel.

15 Q. Section Number 6, "Attorney's
16 fees." I will direct your attention to
17 that section. Do you see it?

18 A. Yes, I see it.

19 Q. Then reading just a little more
20 than halfway through, you see where it
21 says, "Because the Court has determined
22 that Calpine has breached the agreement
23 for purchase such that SAI Trust should be
24 granted summary judgment and Calpine
25 should be denied summary adjudication on

1 Proceedings

2 the issue of the use of allocated expense
3 line items, SAI Trust is entitled to
4 attorney's fees and other costs with
5 respect to litigations at issue."

6 Do you see that?

7 A. Yes, I see it.

8 Q. Did I fairly and accurately read
9 that into the record, sir?

10 MR. NICOLOSI: We have a copy of
11 the document. All three of us can
12 read pretty well I think.

13 MR. GLYNN: I would like to move
14 Defendant's Exhibit A into evidence.

15 MR. NICOLOSI: Okay. Anybody
16 have any objection? No objection?

17 For the limited purpose of what
18 you have referenced and for no other
19 purpose.

20 MR. GLYNN: Just to establish
21 that there was the decision that SAI
22 was entitled to attorney's fees to be
23 paid by Calpine.

24 MR. NICOLOSI: Can I just, for
25 my own edification, what does that

1 Proceedings

2 have to do with the client's
3 obligation to pay you for your fees?

4 MR. GLYNN: If I can go through
5 the next exhibits, hopefully I will be
6 able to clarify.

7 MR. NICOLOSI: Stay with this
8 because you introduced it. What does
9 that statement in the Judge's decision
10 have to do with their obligation to
11 pay you the fees that you billed?

12 MR. GLYNN: I offer it to
13 establish that there was a distinction
14 between what was owed to SAI for
15 allocated line expenses which had been
16 improperly taken out and attorney's
17 fees.

18 MR. NICOLOSI: Wouldn't you have
19 to enforce this against your
20 adversary?

21 MR. GLYNN: Correct,
22 Mr. Chairman. Exactly, yes. It would
23 be something that would have to be
24 enforced against Calpine.

25 MR. NICOLOSI: My only question

1 Proceedings

2 is why are you addressing that now if
3 it has nothing to do with their
4 obligation to pay you something
5 separate and apart from your recovery
6 against a defaulting party?

7 MR. GLYNN: To lay a foundation
8 which I will get to.

9 If you'd like, I will answer
10 that question right now.

11 Q. If you would turn to Exhibit M.
12 Mr. Membreno, do you have that in front of
13 you?

14 A. Yes, I have it.

15 Q. Do you recognize this document?

16 A. I have signed it. Yes, I
17 suppose. Yes.

18 Q. If you could turn to page 7 --
19 sorry. Page 8. There is two page 8's.
20 The signature page for Respondent's
21 Exhibit M. Do you recognize that to be
22 your signature, sir?

23 A. Yes. It is my signature.

24 Q. And this is a settlement and
25 release agreement that was entered in

1 Proceedings

2 March of 2010. It is not dated. Do you
3 see that?

4 A. On behalf of the trust I signed
5 this agreement. Yes.

6 Q. And this was an agreement
7 between what parties?

8 A. I have to go back and see who
9 is --

10 MR. NICOLOSI: We'll take notice
11 that it is between your client and
12 Calpine.

13 MR. GLYNN: Various Calpine
14 entities.

15 MR. NICOLOSI: There was a
16 separate page.

17 Q. Turn to page 7, Mr. Membreno.

18 A. Yes.

19 Q. Paragraph 17, do you recognize
20 that paragraph? Have you seen that
21 paragraph before?

22 A. Well, let's assume it was -- I
23 have seen it before. Yes.

24 Q. It says, "Nothing in this
25 agreement is intended to or does create

1 Proceedings

2 any rights in third parties."

3 Did you negotiate that
4 particular paragraph?

5 A. Apparently we did because it is
6 included in the final agreement.

7 Q. Do you know what the basis for
8 that particular paragraph was?

9 A. No, I don't. I am not an
10 attorney so I would not know.

11 MR. NICOLOSI: Counsel, we are
12 going a little far afield here. What
13 does that paragraph 17 have to do with
14 their responsibility to pay you a
15 legal fee?

16 MR. GLYNN: Then going to
17 Calpine for the unpaid attorney's fees
18 under the contingency fee, this
19 settlement agreement was specifically
20 raised by them in reference to the
21 fact that there was no third party --
22 that they specifically settled this --

23 MR. NICOLOSI: Did this
24 exculpate them from the provision of
25 the decision you just referenced?

1 Proceedings

2 MR. GLYNN: I believe it did.

3 MR. NICOLOSI: So how -- so did
4 you represent them in this agreement?

5 MR. GLYNN: No. At that point
6 the client decided that they were
7 going to --

8 MR. NICOLOSI: This is
9 California counsel did this?

10 MR. GLYNN: California counsel
11 did this basically behind my back.

12 MR. NICOLOSI: Not behind your
13 back. You were discharged by that
14 time.

15 MR. GLYNN: That is the problem.
16 I wasn't discharged. I was still
17 attending conferences and still
18 providing status reports. They never
19 actually --

20 MR. ROSEN: Did you receive a
21 letter from the client saying you were
22 discharged, to take no further action?

23 MR. GLYNN: No. No such letter
24 was ever sent saying, "You are
25 discharged and take no further

1 Proceedings

2 action." In those terms, no.

3 MR. ROSEN: In any terms?

4 MR. GLYNN: I know there was a
5 limited e-mail that made some mention
6 of it. Unfortunately, thereafter they
7 were still sending numerous e-mails
8 and requests for services to be
9 performed. There was no formal
10 discharge.

11 MR. NICOLOSI: But again, the
12 fact that it was part of the
13 settlement agreement that they were
14 let off the hook, so to speak, as to
15 pay the obligations pursuant to the
16 decision and order of the District
17 Court -- how does that inure to your
18 benefit to -- let me withdraw that.

19 Are you implying that because
20 they did that they are now obligated
21 to pay what Calpine was going to be
22 obligated to pay?

23 MR. GLYNN: Yes.

24 MR. NICOLOSI: Okay.

25 MR. GLYNN: Yes. If we can turn

1 Proceedings

2 to Exhibit B?

3 I would like to move Exhibit M
4 in evidence.

5 MR. NICOLOSI: Yes. For
6 whatever value. Sure.

7 MR. NICOLOSI: March of 2010,
8 undated other than March 2010.

9 BY MR. GLYNN:

10 Q. Mr. Membreno, do you recognize
11 Exhibit B?

12 A. Yes, I do recognize it.

13 Q. You have seen this before today?

14 A. Yes, I see it.

15 Q. Did you see that before today?

16 A. I might have seen it in the form
17 of e-mails.

18 Q. The date is October 8, 2009. Do
19 you see that at the top?

20 A. Yes.

21 Q. Do you recall receiving this
22 e-mail on October 8, 2009?

23 A. Yes. I recall.

24 Q. And in this e-mail I was
25 proposing that going forward under my new

1 Proceedings

2 firm, that we would be a 22-and-a-half
3 percent contingency fee. Correct? You
4 see that in the body of the e-mail?

5 A. At the bottom I see -- I think
6 that there are two e-mails. Is that
7 correct? One is --

8 Q. We are just looking at Exhibit
9 B. This is one e-mail. Correct?

10 A. Yes. There is -- you are
11 proposing a 22-and-a-half percent
12 contingency fee.

13 Q. Correct. And you recall
14 receiving that on or about October 8,
15 2009. Correct?

16 A. Yes.

17 MR. NICOLOSI: Let the record
18 indicate that the panel has received a
19 copy of this e-mail with other
20 documents that were provided by the
21 Court. The client has indicated that
22 he recognizes it and did receive it.

23 Do you want to mark that?

24 MR. GLYNN: Can we move this
25 into evidence?

1 Proceedings

2 Let's move Exhibit B into
3 evidence, please. That is the
4 October 8, 2009 e-mail.

5 MR. NICOLOSI: You know what?
6 Move the whole book in. You went to
7 the trouble of preparing it.

8 MR. GLYNN: I appreciate that.

9 MR. SULLIVAN: We have our own
10 book. We have some duplication. A
11 lot of the exhibits are the same. I
12 doubt there is much issue over
13 authenticity or foundation for any of
14 them except in one of our exhibits is
15 a calculation that I performed myself
16 that counsel is obviously permitted to
17 take issue with. It is more legal
18 argument than anything else.

19 MR. NICOLOSI: Maybe it is
20 easier for the reporter if we say the
21 book prepared by counsel that contains
22 Exhibits A through N will be received
23 in evidence as one exhibit
24 collectively, Exhibit AA.

25 (So marked for identification as

1 Proceedings

2 Respondent Exhibit AA.)

3 MR. GLYNN: If I can ask
4 Mr. Membreno about one particular
5 exhibit?

6 MR. NICOLOSI: Sure.

7 Q. If you could turn, Mr. Membreno,
8 to Exhibit L?

9 MR. SULLIVAN: Your book was A
10 through N.

11 MR. NICOLOSI: Make it AA.

12 MR. GLYNN: The book is AA?

13 MR. NICOLOSI: Yes.

14 Q. Mr. Membreno, do you have
15 Exhibit L in front of you?

16 A. I do.

17 Q. That is the December 12, 2009
18 e-mail from myself to you and Marc
19 Membreno. Correct?

20 A. Yes.

21 Q. Did you receive this e-mail on
22 or about December 12, 2009?

23 A. Okay. Let's assume we did.

24 Q. I am not asking you to assume.
25 I am asking if you did.

1 Proceedings

2 A. If you sent it, I must have
3 received it.

4 MR. SULLIVAN: December 12th. I
5 think you said December 9th.

6 MR. GLYNN: December 12, 2009.

7 MR. NICOLOSI: What exhibit is
8 that?

9 MR. GLYNN: Exhibit L.

10 Q. I will read from the middle
11 paragraph about the fourth line down.
12 "Robert, please be advised that I will
13 agree to modify the fee and proceed on a
14 time basis for all past and future
15 invoices but will insist that in
16 consideration for this modification of the
17 agreement SAI pay to my firm the amount of
18 \$25,000. If you want to refer to this as
19 a performance bonus, that is acceptable."

20 Do you see that sir?

21 A. Yes, I do.

22 Q. Did you have any objection to
23 that at the time that was sent to you?

24 A. I did object to that.

25 Q. When?

1 Proceedings

2 A. Immediately after that.

3 Q. And how so did you object to it?

4 A. I don't recall.

5 Q. Did you send an e-mail?

6 A. I don't remember.

7 Q. Did you call?

8 A. I don't remember.

9 Q. Do you have an e-mail that shows
10 that you objected to that?

11 A. Am I being cross-examined about
12 this thing, or what?

13 MR. NICOLOSI: He has the right
14 to ask you questions.

15 A. No. I didn't -- I don't recall.

16 Q. Thank you. So that's a no.

17 MR. NICOLOSI: It is not a no.
18 He is saying he doesn't recall.

19 Q. Do you have an e-mail that shows
20 that you objected to that?

21 A. No, I don't have an e-mail.

22 Q. I would like to direct your
23 attention to Exhibit I, sir. This is a
24 December 8, 2009 e-mail, again from myself
25 to -- I correct that. This is a

1 Proceedings

2 December 8, 2009 e-mail from Mgm9@aol.com.

3 Do you recognize that e-mail address?

4 A. Yes, I do.

5 Q. Whose e-mail address is that?

6 A. That is my son's, Marc.

7 Q. That is sent to L. Glynn at

8 Carusoglynn.com. Correct?

9 A. Yes.

10 Q. You are cc'd on that. Correct?

11 A. Yes.

12 Q. The e-mail that is under the cc

13 line is Skipperjm@yahoo.com?

14 A. That is mine.

15 Q. Do you recall receiving this
16 e-mail, sir, on or about December 8, 2009?

17 A. Probably have. I don't recall
18 but I probably did.

19 Q. Looking at the first paragraph,
20 it says, "Dear Larry, we are very
21 concerned with your statement that as of
22 October 1st you are handling the matter on
23 a contingency fee basis. We have always
24 and will continue to work with our counsel
25 on a time basis. In your October 8th

1 Proceedings

2 e-mail you stated, 'If you would prefer to
3 stay with a time basis, please advise.'
4 We notified you that we would prefer to
5 continue on a time basis even at the new
6 higher hourly rate."

7 Do you see that, sir?

8 A. Yes, I do.

9 Q. Did you author this e-mail or
10 was this from Marc Membreno?

11 A. We probably talked about it and
12 came to this offer or this conclusion.

13 Q. Where it states, "We notified
14 you that we would prefer to continue on a
15 time basis," do you have any evidence to
16 support that you did, in fact, notify that
17 you would prefer to continue on a time
18 basis?

19 A. Would you ask the question
20 again, please?

21 Q. Yes. Do you have any evidence
22 to support that statement that you
23 notified me that you preferred to continue
24 on a time basis?

25 A. Maybe I do, maybe I don't.

1 Proceedings

2 Q. Do you recall sending any e-mail
3 specifically objecting to the contingency
4 fee?

5 A. I must have communicated that to
6 Marc, to convey it to you.

7 Q. Do you have any e-mail, as we
8 sit here today --

9 A. I don't know. Maybe we just
10 talked on the telephone.

11 Q. Do you recall speaking with me
12 on the telephone about --

13 A. No, not with you.

14 Q. Who did you speak with, sir?

15 A. I must have spoken with Marc, to
16 convey the message to you. Otherwise you
17 wouldn't have written.

18 MR. GLYNN: May I go -- there
19 are two witnesses here, to speed
20 things along, would it be okay to
21 question Mr. Marc Membreno
22 contemporaneously?

23 MR. NICOLOSI: I have one
24 question. In your response that you
25 typed to request the fee arbitration,

1 Proceedings

2 did you not concede that it was in
3 December of '09 that your suggestion
4 of a contingency fee basis was
5 disavowed by your client?

6 MR. GLYNN: It was an accord to
7 the client. I don't concede it was
8 disavowed. It was an accord to the
9 client under certain conditions, to
10 wit, number one, payment of all
11 invoices within 30 days. They did not
12 do that.

13 Number two, payment of \$25,000.
14 If they want to refer to it as a
15 performance bonus, that was fine.
16 They never paid that.

17 So we were looking at modifying
18 what was an existing contingency fee
19 agreement. They breached the
20 modification. I am able to elect my
21 remedy and I have now withdrawn any
22 claim that I am entitled to time and
23 relying specifically on the initial
24 agreement, which was for contingency,
25 followed up by two invoices in

1 Proceedings

2 November and December which both set
3 up an account stated.

4 New York law is very clear.

5 This is an account stated. They never
6 timely objected to it. We tried to
7 work out a modification and we were
8 never able to come to agreement on a
9 modification of the agreement because
10 they did not pay timely in 30 days,
11 did not pay all bills in full and did
12 not pay the \$25,000 performance bonus.

13 Now we are going back to what
14 the initial agreement was. There is
15 no objection. The Membrenos cannot
16 point to any objection. They say they
17 have concerns, they ask for
18 explanations, but they don't have any
19 objections. They received two
20 invoices that showed no charge, fee
21 waived, contingency fee.

22 Apparently at some point they
23 started going back to their California
24 counsel, who I do believe is also
25 significantly involved in this,

1 Proceedings

2 especially given the settlement
3 agreement, Exhibit M, which was
4 conveniently hammered out by
5 California counsel after I had done
6 three years' worth of work and about
7 nine months under the new firm in
8 shaping this settlement to get a case
9 that was worth zero when it came to my
10 office to in excess of a million
11 dollars when they were only entitled
12 to roughly 780,000 to begin with.

13 That is a \$230,000-plus windfall
14 that these folks got.

15 MR. NICOLOSI: I have to repeat,
16 whether you were successful or whether
17 you got zero, that is not why we are
18 here.

19 Did there come a point, and
20 based upon the submissions that you
21 gave us and the papers that you filed
22 with the Court, are you suggesting
23 that the invoices that you attached as
24 exhibits in this book and in what you
25 gave the Court was an alternative

1 Proceedings

2 method of billing in the event that
3 the contingency basis was not
4 established?

5 MR. GLYNN: My position was at
6 that time when I submitted the initial
7 arbitration, notice of arbitration
8 rights, I was willing at that time,
9 for these clients, to let them off the
10 hook and just collect the time amount
11 that they owed me, which they never
12 paid, including the \$25,000.

13 I was willing to do that. They
14 refused and have decided to delay --
15 they didn't even timely respond to the
16 arbitration within time. I had to sue
17 them in Civil Court. They delayed.
18 You know, motions, obfuscation.

19 I mean, at some point, I am
20 done. I am not going to be a nice
21 person to these people anymore --

22 MR. ROSEN: Counsel, putting
23 aside your feelings, how does this
24 establish the amount that you are
25 actually owed at the present time?

1 Proceedings

2 MR. GLYNN: The amount I am
3 actually owed at the present time
4 cannot be determined in this forum
5 because my --

6 MR. ROSEN: We are here, sir,
7 and that is our job. If you want to
8 say that, you certainly seem to tie
9 our hands.

10 MR. GLYNN: I believe that given
11 the jurisdictional limit of this
12 forum, \$50,000, that this matter
13 cannot be arbitrated here. I would
14 ask that the panel dismiss the
15 arbitration because we do have a
16 Southern District action pending for
17 the entire amount of the contingency
18 fee that we believe is owed based on
19 the final settlement --

20 MR. NICOLOSI: But you submitted
21 to the jurisdiction by putting in your
22 response to the fee dispute.

23 MR. GLYNN: That was prior.

24 MR. NICOLOSI: Whether it was
25 prior or whatever, you in fact

1 Proceedings

2 submitted to the jurisdiction. And as
3 was just stated by Mr. Rosen, you have
4 sort of tied our hands.

5 What we have before us is what
6 we have to consider. What you do
7 later on to establish your entitlement
8 to 257,000 on a theory of a
9 contingency fee established by
10 non-action on the part of the client,
11 that's another issue but that is not
12 before us.

13 MR. ROSEN: I might add, you
14 understand the basic principle here
15 that the burden of proof to establish
16 the fee is always on the attorney.

17 MR. GLYNN: And I believe that
18 we have established the properness of
19 the time charges, although we rely
20 that there was a contingency fee which
21 was breached, a contingency
22 arrangement which was breached by this
23 client and that the actual amount of
24 fees due and owing as set forth in our
25 petition, which was also rejected, is

1 Proceedings

2 in excess of \$257,000.

3 MR. SULLIVAN: If I may,
4 Mr. Chairman?

5 MR. NICOLOSI: Yes.

6 MR. SULLIVAN: The entire
7 concept of a contingency fee can be
8 addressed and rejected by the panel.
9 New York law could not be any more
10 clear. The argument that counsel just
11 made really borders on frivolous.

12 Quoting the New York Court of
13 Appeals from 2006. Even if there was
14 ever somehow a contingency fee
15 agreement in place, whether explicit
16 or implicit, New York law is clear.

17 "It is well settled that the
18 client may terminate the contingent
19 fee agreement at any time, leaving the
20 lawyer no cause of action for breach
21 of contract, only quantum meruit.
22 King v. Fox, 7 N.Y.3d, 181, page 192,
23 New York Court of Appeals 2006.

24 MR. NICOLOSI: That stands for
25 after a contingency fee agreement is

1 Proceedings

2 signed by the parties?

3 MR. SULLIVAN: Correct. Even if
4 there was in place, which we
5 vigorously dispute because one cannot
6 be created by implication, it can be
7 terminated at any time by the client.

8 At best for counsel -- he even
9 admitted under oath in Civil Court
10 that in December 2009 -- in one of our
11 exhibits in the binder before you is
12 an affidavit counsel signed -- an
13 affirmation I should say -- to the
14 Civil Court of Queens dated
15 January 10, 2011.

16 MR. GLYNN: There is a typo in
17 there.

18 MR. SULLIVAN: Paragraph 8.
19 "SAI then decided that it objected to
20 a contingency fee and offered a
21 \$10,000 performance bonus in lieu of
22 the contingency fee plus payment of
23 all hours worked on a time basis. The
24 undersigned acquiesced."

25 Therefore, no matter what

1 Proceedings

2 happened, even if there was an
3 agreement, as I said we dispute
4 because New York law is also clear it
5 cannot be created by implication;
6 there has to be an express agreement.

7 If there ever was one, it was
8 terminated in December of 2009 and
9 counsel has absolutely no claim to a
10 contingency fee. To assert otherwise,
11 as I said, borders on if not exceeds
12 the barrier of what frivolous is.

13 To say that an account stated
14 was created because they didn't object
15 to the invoices, they did object to
16 the invoice. He admitted under oath
17 and admitted here again they objected
18 to the invoices in December. The
19 first invoice purporting to a be
20 contingency fee --

21 MR. GLYNN: Has to be a timely
22 objection, John.

23 MR. SULLIVAN: -- could not have
24 matured yet because even if there was
25 a contingency fee, it hadn't been

1 Proceedings

2 earned yet because there was
3 no recovery.

4 MR. GLYNN: It has to be timely.

5 MR. SULLIVAN: It was objected
6 less than five weeks later.

7 MR. GLYNN: When are you stating
8 there was an objection?

9 MR. SULLIVAN: You are basing
10 the account stated on an invoice dated
11 November the 3rd.

12 MR. GLYNN: Well, the agreement
13 was --

14 MR. ROSEN: Please, gentlemen,
15 address arguments to us. We don't
16 need to hear you go back and forth.
17 We'll hear that tonight, I promise
18 you.

19 MR. NICOLOSI: Nine o'clock.

20 MR. SULLIVAN: As I said, we
21 submit that the panel can address in
22 the general area was there a
23 contingency fee that could be
24 recovered on? The panel can answer in
25 the negative without having to

1 Proceedings

2 determine what an amount would be
3 because clearly the law is against
4 counsel. The argument cannot be made.

5 To try to say account stated
6 somehow gets around the Court of
7 Appeals saying the only theory they
8 can recover on is quantum meruit.

9 MR. NICOLOSI: Let me ask you, I
10 somehow, from what you have submitted
11 and what you have stated, that for
12 that period, say from October to
13 December, your client made payments?

14 MR. SULLIVAN: Right.

15 MR. NICOLOSI: On a time basis.
16 And what I am getting is -- if you
17 subtracted the 67 from the 49, which
18 is his claim of total billable hours
19 from that period to April of 2010.
20 From October '09 to April '10 it comes
21 to 42,885.

22 He is saying you paid 33,075,
23 which leaves a balance of 9,880 that
24 is, according to his numbers, due and
25 owing.

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2 MR. SULLIVAN: That is his
3 claim, yes.

4 MR. NICOLOSI: On a time basis.
5 Forget contingency.

6 MR. SULLIVAN: Understood. But
7 that time includes a couple of items
8 that, again, we object to. One is the
9 two entries from the first week of
10 October when he was still employed by
11 the Nicoletti firm.

12 MR. NICOLOSI: I took that off.

13 MR. SULLIVAN: You have the
14 roughly \$2,000 of time in December
15 when they are going back and forth
16 over whether the fee is hourly or
17 contingency.

18 MR. NICOLOSI: I got 1,500 on
19 that. The three payments on
20 December 8th and three payments on
21 December 11th. That, I got roughly at
22 1,500, rounded.

23 MR. SULLIVAN: It is a little
24 more than that, Mr. Chairman. It is
25 closer to 2,000. I can go over it

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2 again.

3 MR. NICOLOSI: You gave me 448,
4 128 and 928.

5 MR. SULLIVAN: That was just on
6 December 11th. There were three
7 entries on December 8th as well.

8 MR. NICOLOSI: 348 on
9 December 8th.

10 MR. SULLIVAN: I believe it was
11 448.

12 MR. GLYNN: 348.

13 MR. NICOLOSI: 348 are the
14 entries. 348, 128, 498 and 928 on
15 December 11th.

16 MR. SULLIVAN: On December 8th
17 we have three entries. A \$32 entry, a
18 \$160 entry plus a 256 entry, is 448
19 for December 8th, plus the 1,500
20 roughly for December 11th takes us
21 over \$2,000.

22 MR. NICOLOSI: Okay. Let's
23 accept those numbers.

24 MR. SULLIVAN: The other
25 difference comes down to is there a

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2 performance bonus.

3 MR. GLYNN: They say 10,000. I
4 say it was 25.

5 MR. SULLIVAN: His 49
6 calculation assumes it was 10.

7 MR. GLYNN: It doesn't even
8 assume it was 25.

9 MR. SULLIVAN: It assumes it was
10 10. If you take it off, you take it
11 down to 39 less what we paid and what
12 we overpaid and what should have been
13 deducted, you are getting below the
14 amount we have paid.

15 MR. NICOLOSI: Anything else?

16 MR. SULLIVAN: Start with 49,
17 deduct 10, deduct the 11 we say should
18 have come off, you get under 30 and we
19 paid over 30.

20 MR. NICOLOSI: Anything else?

21 MR. GLYNN: No, Mr. Chairman.

22 MR. NICOLOSI: Mr. Sullivan?

23 MR. SULLIVAN: Just if I may
24 take you through the exhibits, I can
25 explain what the exhibits are before

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2 you. This would be clients' list of
3 exhibits book, Exhibits 1 through 20.

4 Exhibit 1 is apparently the last
5 e-mail that counsel sent to client
6 while he was still employed by the
7 prior firm. That is October 7th. The
8 bottom of the page of Exhibit 1, "Very
9 truly yours, Nicoletti Hornig and
10 Sweeney by Lawrence Glynn."

11 Exhibit 2, our copy of what we
12 already discussed as the October 8th
13 e-mail.

14 Exhibit 3 is an October 20th
15 e-mail exchange wherein client raised
16 the issue, what does the contingency
17 fee mean? I discussed it earlier when
18 I did my opening argument. Exhibit 3
19 is the e-mail exchange that covers
20 that issue when we questioned, "What
21 do you mean by a contingency fee
22 agreement? What does it entail?" And
23 client replied later in the day.

24 Exhibit 4 is a follow-up in the
25 context of both the settlement

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2 negotiations and the contingency fee.

3 Again, by October 30th they are
4 talking about "How do we settle? What
5 are we doing?"

6 December 11th was another
7 various proposal to reduce the
8 proposed contingency fee.

9 Exhibit 5 is clients' response
10 when they first noted the invoice that
11 was issued on November 3rd that said
12 contingency fee waived. On
13 November 23rd they questioned, "What
14 does that mean?" That is when counsel
15 explained, "I am going forward on
16 contingency. Didn't you know?"

17 That's the e-mail at the top of
18 the page, which leads us to the
19 exchange on December 8th, where client
20 rejected the contingency fee. Attorney
21 tried to persuade client to keep it,
22 trying to say it would all come out of
23 Calpine's pocket anyway.

24 Exhibit 7, part of the same
25 exchange. We covered it. Exhibit 7

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2 actually is the one, if you go to the
3 third page of Exhibit 7, that is where
4 counsel proposed not only a \$25,000
5 performance bonus but also wrote --
6 this is an e-mail that was sent on
7 12/11/09 at 1:06 p.m. Pacific time,
8 4:06 New York time.

9 Third paragraph, second
10 sentence: "Please also advise Robert
11 that in the event of a settlement any
12 amount that Calpine does agree to pay
13 above \$850,000 will be exclusively for
14 the account of Caruso Glynn, LLC as
15 attorney's fees, which Calpine must
16 pay under the terms of the purchase
17 agreement as upheld by the decision
18 and order of Judge Victor Marrero."

19 At this point in time, very
20 briefly, Mr. Chairman, I would like
21 Mr. Robert Membreno to explain what
22 his reaction was when he first read
23 that.

24 MR. GLYNN: That's fine.

25 MR. MEMBREÑO: Mr. Chairman, I

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2 have been in the consulting
3 business -- I am an engineer and been
4 in the consulting business for many,
5 many years and, therefore, involved in
6 litigations of various types from time
7 to time.

8 My firm was very successful in
9 the consulting business and we hold
10 very high ethical values as important
11 to our profession. As a matter of
12 fact, as a consultant we have to rely
13 on those values, those ethical values
14 to maintain and grow a firm in that
15 business.

16 So we are very clear when we
17 negotiate an agreement with anybody,
18 including attorneys. And under no
19 circumstances in any of the legal
20 operations with other attorneys we
21 have had contingency fees. Always
22 took the risks involved in defending
23 our positions because, quite frankly,
24 I felt, in directing my company, that
25 we would always be honest and ethical

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2 with everybody.

3 So, I was very much concerned
4 that even though we had, with Calpine,
5 a disagreement on the issues, I would
6 never take advantage of the position
7 granted to us in obtaining the
8 attorney's fees. I would not increase
9 it except for the fact that we, you
10 know, had negotiated the fee structure
11 as adequately as we had.

12 I had a fiduciary responsibility
13 to my trustees, my other trustees and
14 also I felt I had a responsibility to
15 Calpine to make sure that the costs
16 would not be excessive. I mean, that
17 has been my practice and that is why I
18 think I was very successful.

19 So, therefore, the issue of the
20 contingency fee and adding on to a fee
21 above the amount was automatically
22 contrary to my position. And that is
23 why I immediately told Mr. Caruso not
24 to continue providing services because
25 he increased the fees to Calpine

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2 without even our authorization. And
3 that is why we went back to
4 California's attorneys.

5 By the way, they had recommended
6 the firm Nicoletti to handle the case
7 because they had already started the
8 case in California before it went into
9 bankruptcy. So the claims were
10 already ongoing before the bankruptcy
11 proceedings.

12 So when we hired the Nicoletti
13 firm and we stayed with them -- and
14 they did most of the work. As a
15 matter of fact, we had already gotten
16 a judgment from the District Court
17 saying that -- reversing the order of
18 the Bankruptcy Court. So the case was
19 concluded. It was just a question of
20 now putting the numbers together to
21 justify the claims. And I wasn't
22 about to now increase any claims
23 beyond those that were legitimately
24 paid by us or due.

25 MR. NICOLOSI: I take it it's

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2 your contention that you always
3 intended to proceed on a time basis?

4 MR. MEMBREÑO: Yes. Yes,
5 Mr. Chairman.

6 MR. NICOLOSI: Gentlemen, thank
7 you. The arbitrators will confer
8 amongst themselves.

9 MR. SULLIVAN: Mr. Chairman, I
10 prepared written statements that
11 summarize, if you would like to take
12 them as well for each of the members
13 of the panel. Counsel already has a
14 copy.

15 MR. GLYNN: Yes.

16 MR. SULLIVAN: This includes our
17 legal argument, the case citations I
18 mentioned earlier on the record are in
19 the submission.

20 (So marked for identification as
21 Exhibit BB; so marked for
22 identification as Exhibit CC.)

23 (Time noted: 11:23 a.m.)
24
25

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E X A M I N A T I O N S

3

Witness

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R. Membreno

4

By Mr. Glynn

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E X H I B I T S

8

Exhibit

Description

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Respondent Exhibit Book

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Client Exhibit Book

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